IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 18549

EARL RIDDELL ELLIS,

Appellant

— vs. —

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

BRIEF FOR THE APPELLEE UNITED STATES

HONORABLE FRED M. TAYLOR,
United States District Judge

John R. Black and Richard R. Black
of the law firm of
BLACK & BLACK
Pocatello, Idaho

ATTORNEYS FOR APPELLANT

Sylvan A. Jeppesen,
U. S. District Attorney

Robert E. Bakes,
Assistant U. S. District Attorney
for Idaho
Boise, Idaho

ATTORNEYS FOR RESPONDENT

IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 18549

EARL RIDDELL ELLIS,

Appellant

— vs. —

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

BRIEF FOR THE APPELLEE UNITED STATES

HONORABLE FRED M. TAYLOR,
United States District Judge

John R. Black and Richard R. Black
of the law firm of
BLACK & BLACK
Pocatello, Idaho

ATTORNEYS FOR APPELLANT

Sylvan A. Jeppesen,
U. S. District Attorney

Robert E. Bakes,
Assistant U. S. District Attorney
for Idaho
Boise, Idaho

ATTORNEYS FOR RESPONDENT

SUBJECT INDEX

TABLE OF AUTHORITIES CITED

IN THE

United States
Court of Appeals
For the Ninth Circuit

No. 18549

EARL RIDDELL ELLIS,

Appellant

— vs. —

UNITED STATES OF AMERICA,

Appellee

APPEAL FROM THE UNITED STATES DISTRICT COURT OF THE EASTERN DIVISION OF IDAHO

BRIEF FOR THE APPELLEE UNITED STATES

STATEMENT OF PLEADINGS AND MOTIONS

1. Grand Jury Indictment based upon Title 18, U.S.C., Sections 2314, 371 and 2. Clerk's Transcript, page 6-10.
2. Motion to Dismiss based upon the Sixth Amendment, United States Constitution, Rule 7(c) and Rule 12(b) (2) (3), Federal Rules of Criminal Procedure. Clerk's Transcript, page 11-12.
3. Demand for Bill of Particulars based upon Rule 7(f), Federal Rules of Civil Procedure. Clerk's Transcript, page 15.
4. Motion (to return books and records) based upon Rule 16, Federal Rules of Criminal Procedure. Clerk's Transcript, page 16.

STATEMENT OF FACTS

Certain of the facts contained in appellant's statement of facts are controverted by the jury's verdict of guilty, and therefore the following resume' of the facts is presented.

On the second or third of August, 1961, LeRoy Simonson and his wife Nettie Ellen Simonson came to Pocatello from the State of Montana and went to the used car lot operated by the defendant Ellis for the purpose of trading in their 1954 Buick automobile for an automobile in better working condition. Mr. Simonson had known the defendant Ellis previously. (Vol. 1, reporter's transcript, pages 14-17). The defendant Ellis interested Mr. Simonson in a 1957 Buick automobile which was beyond his means to own, and used this for a basis to suggest to Mr. Simonson that he could pay for the car by cashing certain money orders and splitting the money with defendant Ellis. (Vol. 1, reporter's transcript, pages 17-18). After some time, Mr. Simonson agreed to this plan. It took Mrs. Simonson considerable more time and alcohol before she would go along with the scheme. (Vol. II, reporter's transcript, pages 206, 267). The Simonsons agreed to try the 1957 Buick while they were out on their check-cashing venture, because their first attempt to make a check-cashing trip in their own 1954 Buick was a failure because the 1954 Buick broke down. Prior to leaving with the 1957 Buick, Mr. Simonson signed a contract of sale form in blank for the express purpose of protecting the defendant Ellis in case of an accident or a pickup. (Vol. 1, reporter's transcript, pages 40-41).

While on a trip with this car, Mr. Simonson sent the defendant Ellis a $300.00 Western Union money

order from Grand Junction, Colorado, as the defendant Ellis' share of the proceeds of money orders cashed up to that point. (Vol. 1, reporter's transcript, pages 66-67). Upon return from this check-cashing trip, on or about August 21, 1961, Mr. Simonson was arrested on a fugitive warrant and by arrangement of the defendant Ellis, he was represented by the attorneys Black and Black, who represent the appellant in this action, and was bonded out of jail. (Vol. 1, reporter's transcript, pages 153-157; Vol. II, pages 231-247). The Simonsons immediately left the Idaho area in their 1954 Buick which they had brought from Montana and continued cashing the checks throughout the western part of the United States, although the defendant Ellis had instructed them to destroy the remaining checks because they were too hot. (Vol. II, reporter's transcript, page 229). Changing automobiles twice while on this last trip, the Simonsons returned to Idaho in October of 1961 and were immediately arrested by Federal authorities for passing the money orders. (Vol. II, reporter's transcript, pages 240-245; Vol. I, pages 80-83).

While represented by Black and Black, attorneys for the appellant herein, the Simonsons entered a plea of guilty to an information charging them with interstate transportation of the stolen money orders, and in December, 1961, Mr. Simonson was sentenced to three years in prison, and Mrs. Simonson was given a probation period. (Vol. II, reporter's transcript, pages 245-246).

The defendant Ellis denied throughout the trial any connection with the scheme of cashing money orders, and maintained that the $300.00 money

order was payment on the 1957 Buick automobile. To support this defense, the defendant Ellis presented at the trial defendant's Exhibit 16, which was the contract of sale which Mr. Simonson stated he signed in blank. At that time, the defendant's Exhibit 16 was filled in in full, and purported to be a contract of sale of the 1957 automobile to Mr. Simonson, in which transaction the 1954 Buick, bearing the Montana license plates, and which the Simonsons had driven to Pocatello from Montana, was taken in on trade. (Vol. III, reporter's transcript, pages 418-421). The witness Elmer Tarr, who was the bookkeeper and associate of the defendant Ellis in the City Auto Sales lot, testified, contrary to the defendant Ellis, that he had filled in the contract, defendant's Exhibit 16, and that when he received it, it had been signed in blank. That the terms of the contract were dictated by the defendant Ellis sometime after it had been signed by Mr. Simonson. (Vol. I, reporter's transcript, pages 176-182).

The record further discloses that at no time was the 1954 Buick which the Simonsons had brought from Montana traded in as the contract, defendant's Exhibit 16, indicated, and when the Simonsons left Pocatello on or about August 31, 1961, after Mr. Simonson had been bonded out of jail by Mr. Ellis, they left Pocatello in their own 1954 Buick with the Montana license plates. The entire record discloses, as apparently the jury found, that in fact there was no sale of the 1957 Buick automobile to the Simonsons, and that the contract of sale, defendant's exhibit 16, was just what the defendant Ellis told Mr. Simonson it was for, that is, a cover up in case of an accident or a pickup. (Vol. 1, reporter's transcript, pages 40-41).

Upon instructions of their attorneys Black and Black, the Simonsons made a full statement to the Federal authorities, (Vol. 1, reporter's transcript, page 153) and were subpoenaed before the Federal Grand Jury which resulted in the indictment of the defendant Ellis for the charge of aiding, abetting, counseling, and procuring the commission of the crime which the Simonsons had committed.

POINTS AND AUTHORITIES AND SUMMARY OF ARGUMENT

I

An indictment charging the soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, need not state the particulars of the incitement or solicitation, or of the aid or assistance.

Coffin v. *United States*, 156 U.S. 432;
Daniels v. *United States*, 17 F.2d 339 (CA 9, 1927;)
United States v. *Quinn*, 111 F. Supp. 870 (E.D. N.Y. 1953);
United States v. *Ike Nelson*, 273 F.2d 459 (CA 7, 1960);
Hale v. *United States*, 25 F.2d 430 (CA 9, 1928).

II

The motion for a bill of particulars is addressed to the sound discretion of the trial court, and the trial court's ruling thereon will not be disturbed in the absence of an abuse of that discretion.

Cooper v. United States, 282 F.2d 527, 532, (CA 9, 1960);
Nye & Nissen v. *United States*, 168 F.2d 846 (CA 9, 1948);

Schino v. *United States*, 209 F.2d 67, 69 (CA 9, 1953);
Kobey v. *United States*, 208 F.2d 583, 592 (CA 9, 1953).

III

Even when the District Court has abused its discretion, unless the record discloses some evidence of surprise or prejudice, a conviction should not be reversed.

Williams v. *United States*, 289 F.2d 598 (CA 9, 1961);
Sartain v. *United States*, 303 F.2d 859 (CA 9, 1962).

IV

The motion for new trial is addressed to the sound discretion of the trial court.

Prlia v. *United States*, 279 F.2d 407 (CA 9, 1960);
Perez v. *United States*, 297 F.2d 648 (CA 9, 1961).

V

A motion for production and inspection of books and records under Rule 16 requires a showing that the items sought may be material to the preparation of the defense.

Rule 16, Federal Rules of Criminal Procedure.

VI

Where an original document has been destroyed, a photographic copy is admissable where a sufficient foundation is laid disclosing that the photographic copy is a true copy of the original.

Jones on Evidence, 5th Ed., Vol. 1, Sec. 237, 238 and 266; *Fidelity and Deposit Company of*

Maryland v. *Union Trust Co. of Rochester*, 129 F.2d 1006 (CA 2, 1942);

Western, Inc. v. *United States*, 234 F.2d 211 (CA 8, 1956).

VII

The uncorroborated testimony of an accomplice, if believed by a jury, is sufficient basis to justify a conviction.

United States v. Bible, 314 F.2d 106 (CA 9, 1963);

United States v. *Toles*, 308 F.2d 590 (CA 9, 1962);

United States v. *Williams*, 308 F.2d 664 (CA 9, 1962).

VIII

Where the sentence imposed upon conviction is within the limits fixed by law, it is within the discretion of the trial court and will not be disturbed upon appeal in the absence of an abuse of that discretion.

Berg v. *United States*, 176 F.2d 122 (CA 9, 1949) cert. den. 338 U.S. 876, 70 S.Ct. 137, 94 L.Ed. 537;

Hayes v. *United States*, 238 F.2d 318 (CA 10, 1956) cert. den. 353 U.S. 983, 77 S.Ct. 1280, 1 L.Ed. 2nd 1142;

United States v. *Gottfried*, 165 F.2d 360, cert. den. 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139;

Bell v. *United States*, 100 F.2d 474 (CA 5, 1938);

United States v. *Hoffman*, 137 F.2d 416 (CA 2, 1943).

ARGUMENT

Appellant having failed to file with the Clerk of this Court and serve upon the adverse party, a con-

cise statement of points upon which he intended to rely, as provided in Rule 17(6) and Rule 10 of the Rules of the United States Court of Appeals for the Ninth Circuit, and appellee not being advised by the Clerk of the Court regarding the disposition of its alternative motion to compel appellant to so file and serve the points upon which he intended to rely, or in the alternative to dismiss the appeal, appellee will base its argument upon the specifications as they are described on page 14 through 17 of the appellant's brief.

The first specification of error set out in appellant's brief is that the trial court erred in overruling appellant's motion to dismiss the indictment. For the purposes of illustration, appellant sets out on page 27 of his brief Count One of the indictment. Appellant does not question the fact that the first paragraph of Count One describes with requisite particularity the offense of passing the money orders, but contends that the second paragraph is not sufficient to tie the appellant with the crime specifically charged in the first paragraph. The second paragraph reads as follows:

> "And the Grand Jury further charges:
> "That at the time and place first above mentioned, the defendant, Earl Riddell Ellis, willfully, knowingly and feloniously did aid, abet, counsel, induce and procure the commission of the above described offense; this also in violation of Section 2314, Title 18, United States Code."

In his brief appellant has collected a number of cases which state the general proposition that it is not sufficient to charge the violation of a statute in the language of the statute unless those words of them-

selves fully, directly and expressly, without any uncertainty or ambiguity set forth all of the elements necessary to constitute the offense intended to be punished. However, none of the cases cited by appellant in his brief interpret or are concerned with the proper manner of pleading "aiding and abetting" as that crime is charged in Title 18, U.S.C., Section 2.

An examination of the decisions will show that the Supreme Court of the United States has ruled that the words, "aid, abet, counsel, induce and procure", are not ambiguous, or "generic", as contended by counsel, but are specific statements of fact, and in and of themselves constitute a particular charge of facts. Thus, in *Coffin* v. *United States*, 156 U.S. 432, 448, the Supreme Court stated:

> "Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in United States v. Simmons, 96 U.S. 360, 363, as follows: 'Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement. It is laid down as a general rule that "in an indictment for soliciting or inciting to the commission of a crime, or for aiding or assisting in the commission of it, it is not necessary to state the particulars of the incitement or solicitation, or of the aid or assistance' " * * *"

The courts of appeals have uniformly followed this decision as well they must. *Daniels* v. *United States*, 17 F.2d 339 (CA 9, 1927); *United States* v. *Quinn*, 111 F. Supp. 870 (E.D. N.Y., 1953); *United States*

v. *Ike Nelson*, 273 F.2d 459 (CA 7, 1960). As stated in *Hale* v. *United States*, 25 F.2d 430 (CA 8, 1928):

> "The next point urged is that the indictment is insufficient to support a judgment of conviction insofar as this plaintiff in error is concerned. The grounds stated are that it does not set forth the offense with such clearness and certainty as to apprise the accused, as an abettor, of the crime with which he stands charged; that it does not furnish the accused with such a description as would enable him to make his defense and avail himself of his conviction or acquittal for protection against a further prosecution, that it does not inform the court of the facts alleged with sufficient definiteness and certainty to enable the court to decide whether or not those facts are sufficient in law to support a conviction — in other words, that it does not inform plaintiff in error 'how or in what manner he aided Ramsey, nor how he abetted him, or counseled or commanded or procured him to do the deed in question.'
>
> "The indictment, after setting out with requisite particularity the acts of John Ramsey, who committed the murder, charges plaintiff in error in the following language:
>
> > " 'That William K. Hale, a white person, late of the said district, then and there unlawfully, feloniously, willfully, deliberately, maliciously, and premeditatedly, and with malice aforethought on his part, did aid, abet, counsel, command, and procure the said John Ramsey in so doing and so to do.'
>
> "This method of charging one who aids or abets

> in the commission of a crime has been authoritatively approved. In *Coffin* v. *United States*, 156 U.S. 432, 448, 15 S.Ct. 394, 400 (39 L.Ed. 481), the court said: 'Nor is the contention sound that the particular act by which the aiding and abetting was consummated must be specifically set out. The general rule upon this subject is stated in *United States* v. *Simmons*, 96 U.S. 360, 363 (24 L.Ed. 819), as follows: "Nor was it necessary, as argued by counsel for the accused, to set forth the special means employed to effect the alleged unlawful procurement." ' "

Appellant's further argument (appellant's brief, p. 32) that "obviously, if the first four counts do not satisfy the requirements of the Sixth Amendment of the Constitution and Rule 7(c), then the fifth count also fails to state any offense," is a *non sequitur*. Additionally, it does not state the law as shown by the following quotation from *Wong Tai* v. *United States*, 273 U.S. 77, 81, 47 S.Ct. 300, 71 L.Ed. 545 (1926), wherein the Supreme Court stated:

> "It is well settled that in an indictment for conspiring to commit an offense — in which the conspiracy is the gist of crime — it is not necessary to allege with technical precision all of the elements essential to the commission of the offense which is the object of the conspiracy, *Williamson* v. *United States*, 207 U.S. 425, 447, or to state such object with the detail which would be required in an indictment for committing the substantive offense,***(citing cases). In charging such a conspiracy 'certainty to a common intent, sufficient to identify the of-

fense which the defendants conspired to commit, is all that is necessary.' "

Count Five of the present indictment not only describes a conspiracy with a "certainty to a common intent, sufficient to identify the offense which the two defendants conspired to commit," but in addition, incorporates by reference the allegations of fact in the first four counts of the indictment which describe in detail how the conspiracy was consummated. Viewed in this light, Count Five was more than adequate.

Williamson v. *United States*, 310 F.2d 192 (CA 9, 1962);

Toliver v. *United States*, 224 F.2d 742 (CA 9, 1955);

Rubio v. *United States*, 22 F.2d 766 (CA 9, 1927).

Actually, appellant could have been charged as a principal in each of the counts of this indictment, even though the proof would have shown that he procured and caused the commission of the crime in violation of Title 18, Sec. 2. *Nye & Nissen, et al* v. *United States*, 168 F.2d 846 (CA 9, 1948); *United States* v. *Decker*, 51 F. Supp. 20, affirmed 140 F.2d 375 (CA 4, 1944), cert. den. 321 U.S. 792, 64 S.Ct. 791, 88 L.Ed. 1082; *Melling v. United States*, 25 F.2d 92 (CA 7, 1928).

And, since the first paragraph of each of the four counts of the indictment in this case describes the crime committed with requisite particularity, appellant can hardly complain that he has been prejudiced by the fact that the indictment additionally advised him that the evidence would show that he aided, abetted, procured and caused the commission of the crime.

The appellant's second and third assignments of error concerns the refusal of the trial court to grant his motion for bill of particulars. The only question before this court at this time is whether or not the district court abused its discretion in so denying, because as stated many times, "the motion for a bill of particulars is addressed to the sound discretion of the trial court and the trial court's ruling thereon should not be disturbed in the absence of an abuse of that discretion." *Cooper* v. *United States*, 282 F.2d 527, 532 (CA 9, 1960); *Nye & Nissen* v. *United States*, 168 F.2d 846 (CA 9, 1948); *Schino* v. *United States*, 209 F.2d 67, (CA 9, 1953); *Kobey* v. *United States*, 208 F.2d 583, 592 (CA 9, 1953)."

It is generally stated by all courts that "a bill of particulars is to define more specifically the offense charged and does not function as a device through which a defendant can secure evidentiary details upon which the government will rely at trial." *United States* v. *Grado*, 154 F. Supp. 878, 881 (W.D. Mo., 1957); *Steffler* v. *United States*, 143 F.2d 772 (CA 7, 1944); *Cefalu* v. *United States*, 234 F.2d 522 (CA 10, 1956).

It has been held that where a person is charged with aiding and abetting the commission of a crime which is particularly described in the indictment, such as done in the first paragraph of Count One through Count Four in this case, no bill of particulars will lie to obtain additional evidence of the aiding, abetting and procuring. *United States* v. *Steinberg, et al*, 48 F. Supp. 182 (DC Mass., 1942); *Coffin v. United States*, 156 U.S. 432.

The rule of the *Steinberg* case seems reasonable since as described on page 12 of this brief, appellant

could have been charged as a principal, even though the proof would have shown him to have procured the commission of a crime, thus being an accessory as described in Title 18, Sec. 2. Appellant does not question that the first paragraph of each of Counts One through Four describes the crime with requisite particularity, appellant's objection being that the second paragraph which describes appellant as aiding and abetting and procuring the commission of the offense described in the first paragraph does not tell him how, where, who, and when he aided, abetted, caused and procured the commission of the offense. If appellant had been charged as a principal in the first paragraph, no bill of particulars would lie. It hardly seems reasonable that to further advise him that the proof will show that he aided, abetted, caused and procured the commission of the offense could prejudice him. *Nye & Nissen* v. *United States*. 168 F.2d 846 (CA 9, 1948).

Assuming the request for particulars had been such that the trial court should have granted it, this court has held that "in the absence of some evidence or surprise, as evinced perhaps by a defendant's motion for a continuance, the discretion of the trial court should not be disturbed." *Williams* v. *United States*, 289 F.2d 598 (CA 9, 1961); *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

In the case now before the court the record not only discloses a lack of prejudice or surprise, but on the contrary shows that the appellant knew exactly what the evidence to be produced against him would be, and prepared a comprehensive and detailed defense to meet that evidence. (Vol. III, reporter's transcript, pages 405-448).

The Government's witnesses who the defendant was alleged to have aided and abetted, were produced by the Government and were cross-examined at extreme length by the defendant's counsel. There was no withholding of witnesses or names as in *Roviaro* v. *United States*, 353 U.S. 53, 77 S.Ct. 623, 1 L.Ed. 2d 639 (1957). Compare, *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

The entire transaction concerning the defendant Ellis causing and procuring and aiding and abetting the Simonsons in passing the money orders resulted from the initial desire on the part of the Simonsons to purchase a car from the defendant Ellis. The defendant Ellis had interested them in a car which was beyond their means to pay for, and it was in this manner that the defendant Ellis sugested to Mr. Simonson that he could pay for the car by cashing the money orders which he subsequently delivered to them. The Simonsons took the car, a 1957 Buick, which at that time they had not yet purchased, and went out on a venture of cashing these checks. While on the trip they forwarded by Western Union money order the amount of $300.00 to the defendant Ellis as his share of the proceeds in cashing the checks, using the fictitious name of Orville Daves. This transmission of money was set out as overt act No. 6 in the indictment. Thus, from the time of the filing of the indictment, the defendant Ellis was aware of the fact that he would be required to explain the receipt by him of the $300.00 money order from one Orville Daves. In explanation of this, he produced at the trial the original of an alleged contract of sale of the 1957 automobile to Simonson. (Defendant's Exhibit No. 16) The terms of the alleged sale called for $300.00 monthly payments, and his explanation

of the receipt of the $300.00 was that it was merely a monthly payment which he thought had come from Simonson's brother-in-law. (Vol. III, reporter's transcript, pages 423, 445). However, the witness Mr. Simonson testified that the contract was signed in blank. (Vol. 1, reporter's transcript, pages 40 and 41). The witness Elmer Tarr testified that the contract had been handed to him sometime after the Simonsons had taken the car by the defendant Ellis, and that the contract was in blank except for Mr. Simonson's signature. (Vol. 1, reporter's transcript, page 176). Witness Tarr testified that defendant Ellis instructed him to fill in the contract and that the particulars of the transaction were furnished by the defendant Ellis. (Vol. 1, reporter's transcript, page 176). The witness Tarr further testified that it was the practice of the defendant Ellis to loan cars and have contracts signed in blank. The witness testified that the defendant Ellis told him that it would be protection in case anything happened. (Vol. 1, reporter's transcript, pages 181 and 182). The entire transaction concerning defendant's Exhibit No. 16, the alleged sale of the 1957 Buick to the Simonsons, was such that the jury was justified in disbelieving it, and this left the defendant Ellis with no explanation of his receipt of the $300.00 money order, other than that given by the witness Simonson, that it was his share from the sale of the money orders. (Vol. 1, transcript, pages 66 and 67).

The detail with which the appellant's defense and alibi fit into the Government's evidence clearly indicates the lack of surprise which that evidence had upon the appellant. cf. *Sartain* v. *United States*, 303 F.2d 859 (CA 9, 1962).

Probably the most compelling reason why there is no evidence of surprise or prejudice in the failure to grant the bill of particulars was that counsel for the appellant was probably more familiar with the particulars than counsel for the Government. When the Simonsons were arrested defendant Ellis arranged for their representation by the attorneys Black and Black, who are here representing him. (Vol. II, reporter's transcript, page 231, 247; Vol. I, pages 153-157) The record discloses that the Simonsons entered pleas of guilty to the charges based upon the advice and recommendations of their attorneys Black and Black. (Vol. II, reporter's transcript, pages 245-246) Having represented the Simonsons in this matter, prior to the time that the charge against the defendant Ellis was presented to the Grand Jury, they, as attorneys for the Simonsons, and here as attorneys for defendant Ellis, were particularly in command of all of the facts concerning the transaction. This knowledge on behalf of the attorneys for the defendant Ellis is clearly disclosed by the cross-examination of Mr. Simonson, Vol. 1, Reporter's Transcript, page 153:

"Q. When did you first make any statement to any Government officer concerning this case?

A. The only statement I ever made concerning this case was here in Pocatello in the jail down there when Mr. Black there was my counsel and instructed me to come clean with it. It was his recommendation that I do it.

Q. Mr. Black was not present when you made the statement, was he?

A. Yes, sir; Richard Black.

Q. He was not present when you made the statement?

A. No, sir, but he was present when he told my wife and I.
Q. He told you to tell the truth?
A. Yes, tell the truth and come clean."

(later at page 157)

Q. Mr. Simonson, isn't it a fact that the reason you decided you were going to put Mr. Ellis on the spot was to save yourself a twenty-year sentence?
A. I put Mr. Ellis on the spot from the instructions of Mr. Richard Black, my attorney. I refused to make a statement until I was instructed by my counsel as to what to do."

In reviewing cases on appeal from a conviction, this court has stated:

"It is the function of this court in reviewing a record such as this, after a verdict of guilty, to take the view of the evidence which is most favorable to the appellee. We are required to accept as true all facts which are reasonably shown by the evidence." *Davenport* v. *United States*, 260 F.2d 591 (CA 9, 1958), cert. den. 359 U.S. 909, 79 S.Ct. 585, 3 L.Ed. 2d 573; *Glasser* v. *United States*, 315 U.S. 60, 62 S.Ct. 457, 86 L.Ed. 680; *United States* v. *Nelson*, 273 F.2d 459 (CA 7, 1960); *Remmer* v. *United States*, 205 F.2d 277 (CA 9, 1953); *Schino* v. *United States*, 209 F.2d 67 (CA 9, 1954)

In view of the rule of law stated in the above authorities, and in view of the testimony of Mr. Simonson, and the circumstances surrounding Mr. Simonson's representation by Black and Black, the appellant's attorneys herein, it is "reasonably shown", as stated in the Davenport case, that the appellant, through his counsel, was fully aware of the entire

transaction, and the entire particulars of the Government's evidence, long before the trial. In fact, appellant's counsel was aware of this evidence prior to the time that the evidence was called to the attention of the Government investigators. With this knowledge, there could be no surprise or prejudice to the defendant. This no doubt explains why the defendant was able to produce such a comprehensive and intricate defense at the trial of the case, and why there was no motion for continuance at the end of the Government's case in order to properly meet the evidence which had been produced.

One other factor indicates the lack of prejudice to the defendant in formulating his defense. After the conclusion of the trial, the defendant made a motion for a new trial and a motion to enlarge the time for making a showing in support of his motion for a new trial. (Vol. 1, clerk's transcript, page 103) The hearing on this motion was set for December 3, at 9:00 o'clock a.m. At the time of the hearing on December 3rd, the defendant had had fifty-one days from the conclusion of the trial in order to obtain and present any new evidence which he might otherwise have presented except for the alleged surprise resulting from refusal to grant the motion for bill of particulars. The only showing made at that time was the filing of an affidavit of one Patrick J. Allison. Assuming the matters set out in his affidavit to be true, its only effect was to tend to impeach the testimony of Mr. Simonson and Elmer Tarr. Again, assuming the contents of the affidavit were true, the impeaching nature of this alleged testimony of Patrick J. Allison was available had the witness been interviewed, and therefore the granting or the denial of the motion for bill of particulars would not have

had any effect upon the availability of this alleged testimony for the appellant.

This affidavit deserves some additional comment. It was taken on November 30, 1962 (Vol. 1, clerk's transcript, page 112), although it was not filed and served on counsel for the United States until the very morning of the hearing, (Vol. 1, clerk's transcript, page 111), and then only as the Judge was ascending the bench to hear the motion, a move well calculated to prevent any counter showing. Before Counsel for the United States had an opportunity to obtain the necessary information for a counter showing, the defendant's motion for a new trial had been denied, the defendant was sentenced, and the notice of appeal filed, on behalf of the defendant, all on the same day, (Vol. 1, clerk's transcript, page 116), thus removing any further jurisdiction in the matter from the District Court. As a result, the United States was prevented from bringing in the original records of the Bannock County Sheriff's Office, showing the manner in which the witness Patrick J. Allison was booked upon arrival there, and was further prevented from submitting to the District Court the original signed statement given by Patrick J. Allison to the Federal Bureau of Investigation, which statement was the basis for the United States going to such extreme lengths to require the attendance of this witness at the trial for purposes of possible rebuttal. Although it would be improper at this point to attempt to go outside of the record and bring in the matters which the Government could have shown in opposition to the facts alleged in the affidavit of Patrick J. Allison, it can be reasonably assumed that had the Government not had a statement from this witness contrary to that set out in the

affidavit, it would not have used the extreme method of a warrant of arrest as a material witness in order to assure his presence for rebuttal purposes at the trial, if needed. (Clerk's transcript, Vol. I, pages 85-87)

In any event, the motion for new trial is addressed to the sound discretion of the trial court, and under all the circumstances there appears to be no abuse of that discretion here. *Prlia* v. *United States*, 279 F.2d 407 (CA 9, 1960).

As stated in *Perez* v. *United States*, 297 F.2d 648 (CA 9, 1961), at page 648:

> "The proposed new evidence was an attempt to impeach the identifying witness, Lira. It all 'existed' prior to the trial. There was no showing of due diligence in seeking it. *Prlia* v. *United States*, 9 Cir. 1960, 279 F.2d 407, 408; *Pitts* v. *United States*, 9 Cir. 1959, 263 F.2d 808, cert. den. 360 U.S. 919, 79 S.Ct. 1438, 3 L.Ed. 2d 1535. The trial judge carefully considered the motion for a new trial, and rejected the worth of the 'newly discovered evidence'. It is Hornbook law that this court cannot second-guess a trier of fact who has heard the testimony, scrutinized the witnesses, and noted their demeanor and behavior on the witness stand (*Jeffries* v. *United States*, 9 Cir. 1954, 215 F.2d 225, 226; *United States* v. *Johnson*, 1946, 327 U.S. 106, 112, 66 S.Ct. 464, 90 L.Ed. 562), and had the opportunity, both at the trial and on motion for a new trial, to place his reliance on those whom *he* believes to have been telling the truth."

Appellant alleges as the fourth specification of error (appellant's brief, page 15) that the failure

to grant his motion to deliver the books and records which had been subpoenaed from Elmer Tarr before the Grand Jury was prejudicial error. However, an examination of the record discloses that at no time prior to the trial did the defendant ever suggest that the books and records were necessary for the preparation of his defense. The original motion for the production of the books and records which the defendant filed on February 14, 1963, does not state that the books and records are necessary for his defense, but on the contrary states:

> "That the restoration of these books and records to the affiant is important and necessary in the conduct of his business as City Auto Sales for the purpose of preparing tax returns, collecting accounts receivable and otherwise carrying on the business known as City Auto Sales;" Clerk's transcript, Vol. 1, page 18.

The record also discloses that at that time the United States disclaimed any further interest in the books and records, and stood ready to turn them over to the person from whom they were subpoenaed, or to such other person as the court would direct. (Clerk's transcript, Vol. 1, pages 31-33; supplemental reporter's transcript, page 21, 23). The record further discloses that the person from whom the United States had obtained the records pursuant to subpoena, Elmer Tarr, was making demand upon the United States for the return of said documents, claiming a proprietary interest in said documents, and the right to immediate possession thereof. (Clerk's transcript, Vol. 1, pages 37-38).

The supplemental reporter's transcript at page 9 discloses that at the time of the filing of the motion

for the production of books and records on February 14, 1963, appellant's counsel stated:

> "Mr. John Black: The reason we have to have the books is stated in the last paragraph, they are needed in the operation of the business and whatever purpose they could serve has been done and they are not legally in the custody of the United States Marshal."

Actually, the first time that the matter of the use of the books and records in the appellant's defense was ever brought up was on October 10, 1962, the morning of the day the jury was selected, and then it was not by the appellant or his counsel, but by the District Judge who suggested that if the defendant wanted to examine the books for the purpose of the trial the court would make them available to the defendant. The supplemental reporter's transcript, page 22-23, discloses the following proceedings:

> "The Court: I remember the incident coming up. I don't think in this proceedings, Mr. Black, that the court is in a position to litigate who is entitled to the records. If the records are of some importance to the defense of this case, the defendant should be able to see the records and have them here.
>
> "Mr. Bakes: The records are in the Marshal's office and will be made available.
>
> "The Court: That is all you want?
>
> "Mr. John Black: Yes sir."

In addition, appellant's entire argument that it was error not to turn the records over to him is based upon an assumption that the appellant was entitled to the books and records. However, the record discloses that there was a conflict over who was entitled

to the records, Elmer Tarr or the defendant Ellis, and, therefore, the appellant not having proved that he was entitled to the records, can certainly not claim error in failing to turn the records over.

Appellant cites Rule 16 of the Federal Rules of Criminal Procedure in support of his motion to obtain the books and records. Rule 16 provides:

> "Upon motion of a defendant at any time after the filing of the indictment or information, the court may order the attorney for the Government to permit the defendant to inspect and copy or photograph designated books, papers, documents or tangible objects, obtained from or belonging to the defendant or obtained from others by seizure or by process upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable. The order shall specify the time, place and manner of making the inspection and of taking the copies or photographs and may prescribe such terms and conditions as are just."

This rule contemplates a showing on behalf of the defendant that the records are necessary for the preparation of the trial. Here the defendant not only made no showing that they were necessary, but did not even suggest that he was requesting them for that purpose until after the District Judge offered to make them available for that purpose on October 10, 1962.

As ordered by the court, the books and records were available to the defendant during the trial, and the defendant prepared and presented a rather comprehensive defense. The defendant made no showing

of surprise, nor requested any continuance to further examine the books and present more evidence. After the trial, the defendant made a motion for a new trial requesting a period of sixty days within which to present new evidence in this matter, and there was no showing of any new evidence discovered from the books and records, or from any other source. The record discloses neither error nor prejudice.

Appellant's tenth assignment of error concerns the admission into evidence of plaintiff's Exhibit No. 2. Appellant's objection seems to be that the copy was not the best evidence because it was not certified. However, whether or not a document is certified is not the test of whether or not it is the best evidence. The general rule is that the original document is the best evidence and unless the original is postively shown to have been unavailable or destroyed, no copy is admissable. As stated in Jones on Evidence, Fifth Edition, Vol. 1, Sec. 237:

> "Since the best evidence rule requires proof of the content of a writing by the writing itself it must necessarily follow in order to prevent miscarriages of justice, that the content of the writing may be proved by other means where the writing itself is unavailable, or for some other legitimate reason it is not possible or feasible to produce it. The situations generally recognized as justifying failure to produce the original writing and resort to secondary evidence instead, treated separately in the succeeding sections, are: loss or destruction, * * *."

However, the eidence here discloses positively that the witness Simonson tore up the original discharge papers and "flushed them down". In Vol. 1, pages

30-31 of the reporter's transcript of evidence the following questions and answers appear:

"Q. Handing you what has been marked as Plaintiff's Exhibit No. 2 for identification, I will ask you to state whether or not you can recgnize that document?
A. This is not the original.
Q. I will ask you whether or not you recognize the document?
A. I recognize it as a copy.
Q. A copy of what?
A. Of the discharge papers.
Q. To which you have testified?
A. With the name of Hugo Keller I used.
Q. This is a copy of the discharge paper which you testified that the defendant furnished you at that time?
A. I would say yes.
Q. What happened to the original of the discharge paper?
A. I destroyed them after cashing the money orders. I tore it up, the wallet and the Social Security card and I tore them up and flushed them down.
Q. Is it your testimony whether or not this is a photographic copy of the discharge papers that the defendant handed you at that time?
A. I would say yes."

With the foregoing foundation having been laid, the photographic copy of the discharge papers was the best evidence available, and was properly admitted. Jones on Evidence, 5th Ed., Vol. 1, Sec. 237, 238, and 266; *Fidelity and Deposit Company of Maryland* v. *Union Trust Company of Rochester*,

New York, 129 F.2d 1006 (CA 2, 1942).

The sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the trial court. As stated in *Western, Inc.* v. *United States*, 234 F.2d 211 (CA 8, 1956), at page 213:

> "The best evidence rule does not require proof of the nonexistence of a document beyond the possibility of mistake, *United States* v. *Sutter*, 21 How. 170, 175, 16 L.Ed. 119, before secondary evidence of its contents is admissable. The rule is not intended as a bar to the ascertainment of truth. The purpose of the rule is to require the production of the best evidence obtainable as to the contents of a document which is shown to be unavailable. The sufficiency of the foundation laid for the admission of secondary evidence rests largely in the discretion of the trial court. *Probst* v. *Trustees of Board of Domestic Missions of General Assembly of Presbyterian Church*, 129 U.S. 182, 188, 9 S.Ct. 263, 32 L.Ed. 642. See also, 20 Am. Jur., Sec. 403, page 364, and Sec. 406, pages 366-367."

Assuming that a proper foundation had not been laid for the admission of the document, its admission, however, would have been "harmless error" because it did not deal with any of the substantive matters of the case but was merely corroborative of Mr. Simonson's testimony. At best, it would merely tend to establish that in fact there was such a person as Hugo Keller. As stated in Rule 52(a) of the Rules of Criminal Procedure:

> "Any error, defect, irregularity or variance which does not affect substantial rights shall be disre-

garded."

cf. *United States* v. *Trumblay*, 208 F.2d 147 (CA 7, 1953)

Appellant's eleventh assignment of error charges that the court failed "to instruct the jury properly as to what consideration should be given to the testimony of accomplices." This error is alleged to be in two parts, first, the failure to give appellant's requested instruction No. 1, 2, 4 and 5, and secondly, the giving of the court's instruction on the uncorroborated testimony of accomplice, a portion of which appellant sets out on page 17 of its brief.

The record discloses, however, that defendant's requested instructions were not timely filed, as required by Rule 9(i), Rules of the United States District Court for the District of Idaho. (Vol. 1, Clerk's Tr., page 93). Rule 9(i) of the Rules of the United States District Court for the District of Idaho is as follows:

> "REQUEST FOR INSTRUCTIONS. Requested instructions shall be served on opposing parties and filed in duplicate with the clerk, at or before the conclusion of the testimony of the first witness for defendant, unless otherwise agreed between court and counsel."

It appears additionally that appellant has failed to comply with Rule 18 (d), Rules of the United States Court of Appeals for the Ninth Circuit, which provides as follows:

> "When the error alleged is to the charge of the court, the specifications shall set out the part referred to totidem verbis, whether it be in in-

structions given or in instructions refused, together with the grounds of the objection urged at the trial."

In any event, the matter contained in appellant's requested instructions 1, 2 and 4 was contained in other instructions given by the court.

Appellant's requested instruction No. 5, to the effect that the jury could not convict upon the uncorroborated testimony of an accomplice, is not the law in the Federal courts. *United States* v. *Bible*, 314 F.2d 106 (CA 9, 1963); *United States* v. *Toles*, 308 F.2d 590 (CA 9, 1962); *United States* v. *Williams*, 308 F.2d 664 (CA 9, 1962).

This court has been asked before to change this rule and has declined. *United States* v. *Williams*, 308 F.2d 664 (CA 9, 1962).

The instruction given by the court, to which the appellant objects in its eleventh assignment of error, has been approved by this court. *United States* v. *Bible*, 314 F.2d 106 (CA 9, 1963).

The final assignment of error argued by appellant (Specification XII) is that the sentence imposed upon the appellant is excessive in view of the sentences imposed upon the two Simonsons who were involved with the appellant. The Federal courts have consistently held that where the sentence imposed upon conviction was within the limits fixed by law, it was within the discretion of the trial court and would not be disturbed upon appeal. *Berg* v. *United States*, 176 F.2d 122 (CA 9, 1949), cert. den. 338 U.S. 876, 70 S.Ct. 137, 94 L.Ed. 537; *Hayes* v. *United States*, 238 F.2d 318 (CA 10, 1956, cert den. 353 U.S. 983, 77 S.Ct. 1280, 1 L.Ed. 2d 1142; *United*

States v. *Gottfried*, 165 F.2d 360, cert. den. 333 U.S. 860, 68 S.Ct. 738, 92 L.Ed. 1139; *Bell* v. *United States*, 100 F.2d 474 (CA 5, 1938); *United States* v. *Hoffman*, 137 F.2d 416 (CA 2, 1943).

However, when the district court wields the power of sentencing in a manner so as to deprive a defendant of his rights, or to coerce him, the courts have reviewed that sentence. In the case cited by appellant in his brief, *United States* v. *Wiley*, 267 F.2d 453 (CA 7, 1959), the trial judge had made it a policy that defendants who pleaded guilty received more leniency than defendants who did not plead guilty. Thus, at page 458, the court stated:

> "In view of the fact that the trial was expedited by waiving a jury and by stipulation of the various items that expedited the proof *I make the sentence less than I otherwise would. It is, however, a serious crime, and it is a case for the imposition of a sentence, either on a plea of guilty or on a trial.* Had there been a plea of guilty in this case probably probation might have been considered under certain terms, but you are all well aware of the standing policy here that once a defendant stands trial that element of grace is removed from the consideration of the Court in the imposition of sentence.
>
> " '*Taking into consideration the various factors that you have referred to — and that I have referred to, I make the sentence less than I otherwise would, but a sentence must be imposed.*' "

A court which operates under such a policy is in effect coercing defendants to plead guilty and is abusing its discretionary powers in sentencing. The

Government here has no argument with the decision in the *Wiley* case. However, in this case there is absolutely no showing here of any such action on the part of the court. On the contrary, the court ordered a pre-sentence investigation in order to obtain more background concerning the punishment which should be imposed upon the appellant.

The record in this case discloses that the appellant was in the business of disposing of stolen goods, or, in the vernacular of the trade, a "fence". In order to accomplish this, he must of necessity induce or procure other persons to dispose of the property for him, as was done in this case. The record further discloses that although the witness Simonson had a previous criminal background, since his marriage to Mrs. Simonson, who had absolutely no criminal record, he had actively followed his trade as an electrician and had been in no trouble. Had it not been for the inducement of the appellant in this case, the Simonsons would not have been involved criminally and Mr. Simonson would very likely have followed his trade and lived a life of a rehabilitated citizen. The threat to society from the man who induces others to engage in criminal activities is much greater than the individual who because of those efforts is induced to commit crime.

The fact that the inducer to crime is considered more serious than the mere performer of crime is no more clearly shown than in the Narcotics Control Act of 1956, 70 Stat. 569, 570; 26 U.S.C.A. 7237(d). Under that Act, the mere possession of narcotics (consumption of narcotics), although punishable by a minimum of a five-year sentence, is subject to probation or parole. However, the importing and sell-

ing of narcotics is punishable by a minimum of a five-year sentence and the Court has no discretion to grant a probation, nor may the defendant be paroled.

Viewing the entire record, the district judge was clearly justified in finding that the defendant Ellis was more culpable than either of the two Simonsons, and certainly has not abused the discretion vested in him.

Appellant's assignments of error Nos. 5, 6, 7 and 8 (appellant's brief, page 15) merely go to the matter of sufficiency of evidence to sustain the conviction. The appellant not having argued these points in his brief, no argument will be presented against these points except the general statement that the record clearly discloses sufficient evidence to sustain and justify the conviction.

CONCLUSION

It is submitted that the judgment of conviction should be affirmed.

Respectfully submitted,

SYLVAN A. JEPPESEN
United States Attorney
By

ROBERT E. BAKES
Assistant United States Attorney

Attorneys for Appellee

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion the foregoing brief is in full compliance with those rules.

ROBERT E. BAKES
Assistant United States Attorney